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FULLE v. DUNNE: THE LIMITS OF LOCAL REAPPORTIONMENT

By
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ONLY ELEVEN YEARS have passed since the United States Supreme Court in *Baker v. Carr*[1] first acknowledged legislative districting as a justiciable issue. Since that first entry into the "political thicket," the Court has developed the one person, one vote principal and refined the tests by which it determines the presence or absence of constitutional infringements on the voting rights of citizens in under-represented districts.

Between the extremes of obvious invidious discrimination, which have summarily been struck down, and "*de minimus*" or uncorrectable variations which have been allowed to stand, the Court has had to establish a multi-factor set of criteria to measure whether or not "middle range" variances from perfection were constitutionally acceptable or unconstitutionally discriminatory under the equal protection clause of the fourteenth amendment. Under these criteria, some variances are justifiable. It is the intent of this paper to examine those criteria and the degree to which they may justify districts unequal in population.

The paper will look particularly at the application of those criteria in the recent Cook County districting case, *Fulle v. Dunne*.[2]

HISTORY

Historically, federal courts declined to enter the "political thicket" of legislative districting at any level—congressional, state legislative or

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1. 369 U.S. 186 (1962).

2. Unpublished memorandum opinion by Judge Hubert L. Will, 73 C 2021 (N.D. Ill. Oct. 11, 1973).

local, considering reapportionment a political question. In 1946, when the Supreme Court entertained a suit challenging the rural-dominated districting plan of the Illinois General Assembly, it said:

> We are of opinion that the petitioners ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.[3]

However, in 1960, the Supreme Court took jurisdiction in *Gomillion v. Lightfoot*,[4] a suit where black citizens of Tuskegee, Alabama challenged a districting plan which redefined the boundaries of the city to exclude black voters.[5] The Court held in distinguishing *Gomillion* from *Colegrove*:

> When a legislature . . . singles out a readily isolated segment of a *racial* minority for special discriminatory treatment, it violates the *Fifteenth Amendment.* In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines . . . . [T]hese considerations lift this controversy out of the so-called "political" arena and into the conventional sphere of constitutional litigation. (Emphasis added.)[6]

Two years later in 1962, the Supreme Court finally acknowledged in *Baker v. Carr*[7] that *non-racial* discrimination in districting was reviewable under the fourteenth amendment.[8] While recognizing that reapportionment legislation had a political aspect, the Court held that *any* state legislation, including reapportionment, could not infringe upon the rights of the state's citizens to fourteenth amendment protections. Justice Brennan said:

> The question here is the consistency of state action with the Federal Constitution . . . . Nor need the appellants in order to succeed in this action, ask the Court to enter upon policy determina-

3. Colegrove v. Green, 328 U.S. 549, 552 (1946). This case involved a challenge to Illinois Congressional districts ranging in population from 112,116 to 914,053.

4. 365 U.S. 339 (1960).

5. Although much has been made of the gerrymandering of the square-shaped city into one having twenty-eight sides, the shape was irrelevant to the outcome of the case. The exclusion of black voters was the key factor.

6. 364 U.S. 339, 346-47 (1960).

7. 369 U.S. 186 (1962).

8. Much of the court's analysis in Baker with respect to vote dilution and its analysis with respect to constitutional criteria for congressional redistricting comes from Justice Black's dissent in Colegrove v. Green, 328 U.S. 549, 566-74 (1946).

> tions for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action. (Emphasis in original.)[9]

On this basis, the Court struck down a patently discriminatory Tennessee legislative districting plan.[10]

However, the more precise standards under which fourteenth amendment scrutiny of challenged reapportionment schemes would go forth were not articulated until *Reynolds v. Sims*.[11] In that case, the Supreme Court struck down a proposed Alabama legislative plan which had population variations of up to 41 to 1 in the Senate and up to 16 to 1 in the House, stating that the "debasement or dilution of the weight of a citizen's vote" can deny the right of suffrage "just as effectively as by wholly prohibiting the free exercise of the franchise."[12] To the extent that a districting plan infringed upon the personal right of any person to exercise the franchise in a free and unimpaired manner, that plan would be struck down, regardless of its "political" origin.

"We are cautioned about the dangers of entering into political thickets and mathematical quagmires," the Court said. "Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."[13] Subsequently, the Court struck down many discriminatory districting schemes at both the *congressional* and *state legislative* level,[14] with

9. 369 U.S. 186, 226 (1962).

10. Approximately one-third of the voting population in the state controlled two-thirds of the seats in the Tennessee state legislature. 179 F. Supp. 824 (M.D. Tenn. 1959).

11. 377 U.S. 533 (1964).

12. *Id.* at 555 (1964).

13. *Id.* at 566 (1964).

14. In Wesberry v. Sanders, 376 U.S. 1 (1964), the Supreme Court had first applied the one person, one vote standard to congressional districting and interpreted article I, § 2 of the Constitution to require that "as nearly as is practicable, one man's vote in a congressional election be worth as much as another's." *Id.* at 8. In that case, the Court found unconstitutional a Georgia districting scheme allowing congressional districts ranging in population from 272,154 to 823,680. Following *Reynolds*' use of a fourteenth amendment analysis, the Court in 1969 struck down a Missouri congressional plan allowing districts ranging from 13,542 above to 12,260 below the "perfect" district population. Kirkpatrick v. Preisler, 394 U.S. 526 (1969). In 1973, the Court struck down a Texas congressional plan allowing districts ranging from 11,362 above to 7,949 below a maximum 4.7 percent spread from the perfect district population. White v. Weiser, 93 S. Ct. 2348 n.2 (1973).

each successive challenge attacking smaller and smaller deviations from population equality.

Additionally, in 1968, the Supreme Court applied the ever-refined one person, one vote doctrine to *local* governing bodies. In *Avery v. Midland County*,[15] districts with populations of 418, 828, 852, and 67,906 each shared equal representation on a County Commission. In that case, as in *Baker*, a gross numerical disparity alone was violative of the right to equal protection for the citizens of the largest district. In *Hadley v. Junior College District of Metropolitan Kansas City, Mo.*,[16] the Court extended *Avery* to school districts and all other elected bodies.[17]

THE TESTS

The Supreme Court never required absolute population equality between electoral districts. From the beginning, the Court recognized that "mathematical exactitude" was not a reasonable requirement for constitutional acceptability and that a range of variation might be permissible.

The tightest standards were maintained for congressional districts which, the Court said, had to be fashioned with "a good-faith effort to achieve precise mathematical equality."[18] Less rigidly, the Court stated that state legislative districts might show some more flexible variations from mathematical perfection if it could be shown that they resulted from "legitimate considerations incident to the effectuation of a rational state policy . . . ."[19]

With respect to state legislative reapportionment plans, the Supreme Court in Roman v. Sincock, 377 U.S. 695 (1964) rejected a plan in which the population of the Delaware House districts ranged from 4,166 to 64,820. Three years later, in Kilgarlin v. Hill, 386 U.S. 120 (1967) the Court held a Texas reapportionment statute unconstitutional which provided for a distribution of population-per-representative of 54,385 to 71,301. Also in 1967, the Court in Swann v. Adams, 385 U.S. 440 (1967) found invalid a plan to redistrict the Florida legislature which allowed a population range of 34,584 to 48,785.

15. 390 U.S. 474 (1968).

16. 397 U.S. 50 (1970). This case involved a challenge to the method of election of trustees of the Junior College District of Metropolitan Kansas City, under which Kansas City, with 60 percent of the district population, elected only 50 percent of the trustees.

17. For examples of lower court decisions with respect to municipal reapportionment, see Shalvoy v. Curran, 393 F.2d 55 (2d Cir. 1968) and Cousins v. City Council of Chicago, 466 F.2d 830 (7th Cir. 1972).

18. Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969).

19. Reynolds v. Sims, 377 U.S. 533, 579 (1964). The Court reiterated in 1973 that application of the absolute equality test of (congressional districts) may impair the normal functioning of state and local governments. Mahan v. Howell, 410 U.S. 315 (1973).

The problem does not lend itself to a uniform mathematical formula, the Court said, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the equal protection clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual state whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.[20]

These factors, in the review of state legislative schemes, included a desire to adhere to traditional or geographic boundaries,[21] compact and contiguous boundaries,[22] and political fairness in apportioning legislative districts so as to maintain the current balance of party power in the state.[23] Even more flexible standards were carved out for deviations from population equality in local governmental districts.[24] In the review of local legislative schemes, legitimating factors included the desire to adhere to traditional political boundaries[25] and a desire not to interfere with established policies of distribution of local services or methods of intra-county cooperation.[26]

The Supreme Court made clear in all these tests that "political motivations" could be acceptable as a basis for some imperfections in a reapportionment plan, while "political gerrymandering" to dilute the effective votes of under-represented persons was not acceptable.

In practice, these emerging standards meant that a state legislative scheme based on legitimate state interests might allow a total variation from population perfection of 16.4 percent,[27] and that a local districting scheme based on unique needs and interests might allow a total variation of at least 11.9 percent.[28] Presumably, an allowable local variation could even be significantly larger.

This expansion of the one person, one vote concept required an extraordinary amount of time expended by the federal courts to balance

20. Reynolds v. Sims, 377 U.S. 533 (1964).
21. *Id.* at 578 (1964).
22. *Id.*
23. Gaffney v. Cummings, 93 S. Ct. 2321 (1973).
24. Abate v. Mundt, 403 U.S. 182, 185 (1971).
25. *E.g.*, Shalvoy v. Curran, 393 F.2d 55 (2d Cir. 1968).
26. *E.g.*, Abate v. Mundt, 403 U.S. 182 (1971).
27. Mahan v. Howell, 410 U.S. 315 (1973).
28. Abate v. Mundt, 403 U.S. 182 (1971).

carefully the asserted state or local interests against the asserted dilution of votes, to determine in each case which interest was paramount. Thus the Supreme Court, faced with having to consider every future reapportionment situation involving a numerical disparity, attempted to restore to the legislatures much of their traditional role.

> That the Court [United States Supreme Court] was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.
>
> . . . Involvements like this must end at some point . . . .[29]

Therefore, the Court held in *Gaffney v. Cummings*[30] that, before the time-consuming balancing tests would be invoked, a *prima facie* case of invidious discrimination at least had to be asserted. In *Gaffney,* the Court was faced with a case where no evidence of racial or other deliberate discrimination was present and the only issue was whether a total numerical disparity between the largest and smallest state legislative districts of 7.93 percent was sufficient to require a redistricting. The Court concluded it was not and did not invoke the balancing tests. In the companion case, *White v. Regester*,[31] the Court similarly held that, in the absence of a specific claim of racial or political discrimination, a numerical claim of 9.9 percent variation from population equality failed to present a *prima facie* equal protection case. Thus, the Supreme Court has suggested in recent cases that variations of up to 10 percent need not be reviewed by the courts or subjected to the factor-balancing tests, absent specific claims of invidious discrimination. The Court announced:

> We doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decisionmaking in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature.[32]

The Court then summarized the categories into which reapportionment challenges might fall:

29. Gaffney v. Cummings, 93 S. Ct. 2321, 2330 (1973).

30. 93 S. Ct. 2321 (1973).

31. 93 S. Ct. 2332 (1973). This case involved a challenge to the apportionment of the Texas state legislature on the basis of population variations among the districts and also a challenge to the several multimember districts which existed in areas of large minority group populations.

32. Gaffney v. Cummings, 93 S. Ct. 2321, 2329-30 (1973).

> As these pronouncements have been worked out in our cases, it has become apparent that the larger variations from substantial equality are too great to be justified by any state interest so far suggested. There were thus the enormous variations stricken down in the early cases . . . as well as the much smaller, but nevertheless unacceptable deviations, appearing in later cases . . . . On the other hand, as Mahan v. Howell demonstrates, population deviations among districts may be sufficiently large to require justification but nonetheless be justifiable and legally sustainable. It is now time to recognize, in the context of the eminently reasonable approach of Reynolds v. Sims, that minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.[33]

Thus, when *Fulle v. Dunne* came to trial, the district court could find the districting plan:

1. Blatantly discriminatory either by gross numerical variations or by the exclusion of discrete classes of voters because of their race, geography, or otherwise.

2. Justifiable and legally sustainable because of local factors which in sum do not detract from the essential population-basis of the plan.

3. Lacking in a numerical disparity sufficient to require full review or the "strict scrutiny" of legitimatizing local factors.

FULLE v. DUNNE

On October 11, 1973, United States District Judge Hubert L. Will issued his opinion in the case of *Fulle v. Dunne*.[34] This opinion ordered the Board of Commissioners of Cook County, Illinois, to reapportion itself by increasing the number of members allotted to the suburban area from five to six, while leaving unchanged the ten member representation from the City of Chicago. A few days after the order, the Cook County Board passed an ordinance conforming to the order, and the case ended. However, it was one which had been under consideration for nearly a decade.

In 1966, Sherman Skolnick, a Chicago area citizen, filed suit seeking to reapportion the County Board in order to increase the representation of the City of Chicago on the Board.[35] An appeal was taken

33. Gaffney v. Cummings, 93 S. Ct. 2321, 2327 (1973).

34. Unpublished memorandum opinion by Judge Hubert L. Will, 73 C 2021 (N.D. Ill., Oct. 11, 1973).

35. Skolnick and Hetteman v. Bd. of Comm'rs of Cook County, unpublished opin-

on aspects of the case not relevant to reapportionment, and when the case was finally returned to the district court, the 1970 census figures had become available showing that the proportionate under-representation had shifted to the suburbs.[36] Skolnick thus lost his standing to sue and the suit was dismissed.

In 1973, the members of the County Board, armed with the new census figures and facing an election in November of 1974, turned again to reapportioning the Board. Floyd Fulle, a suburban County Commissioner and one of the plaintiffs in the subsequent litigation, filed an ordinance before the Board on January 8, 1973, by which the Board would reapportion itself from *ten* city and *five* suburban Commissioners to *nine* city and *six* suburban Commissioners. After passage of the ordinance by the Finance Committee, the total Board rejected the ordinance. The principal reason for the reversal of position was the strong argument of John Stroger, a black Commissioner from the City of Chicago, that the black population in the city was seriously undercounted in the Census of 1970. This was substantiated by a report of the Bureau of the Census itself, issued shortly before the vote, detailing its own undercount estimates.[37]

With the failure of the ordinance, Fulle, together with three suburban citizens, sued the remaining fourteen members of the Board, alleging that the dilution of their votes as suburban residents had denied them equal protection of the laws under the fourteenth amendment.[38] The defendants, the Cook County Board represented by the State's Attorney of Cook County, successfully moved to have Fulle removed from the suit as a plaintiff and added as a defendant so that the defendants were the total County Board.[39]

In the opinion ruling on the cross motions for Summary Judgment, the district court:

ion by Judge Hubert L. Will, 66 C. 1566 (N.D. Ill. Jan. 5, 1968). The complaint alleged that the population of Chicago under the 1960 census of 3,440,404 persons (69.22 percent of the population of Cook County) elected only 67 percent of the Commissioners (ten) while the suburban area with 1,479,321 persons (30.78 percent of the County population) elected 33 percent of the Commissioners (five).

36. *See* Skolnick v. Bd. of Comm'rs, 435 F.2d 361 (7th Cir. 1970).

37. U.S. Dept. of Commerce, Bureau of the Census, Press Release on Census Undercount (Apr. 25, 1973).

38. The suit was brought under 42 U.S.C. § 1983 (1964), which provides standing in federal court to any person for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" against any other person who acts to violate the plaintiff's rights under color of state law.

39. Since Fulle was suing in his individual capacity as a suburban voter, rather than as a member of the Cook County Board, a problem might have arisen concerning

1. Rejected the County Board's argument that the recent cases of *Gaffney v. Cummings*[40] and *White v. Regester*[41] necessarily required a showing of 10 percent deviation from population equality before it could entertain a challenge to the plan, and accepted instead the plaintiff's suggestion that the numerical disparities be tested against possibly justifiable local interests.

2. Ordered an increase in the size of the Board, based on the "transition provisions of the new Illinois Constitution."[42]

3. Accepted the stipulation of the parties and integrated into its decision the defendants' allegation of a population undercount in the 1970 Census.

In distinguishing the factual backgrounds of *Gaffney* and *White*, the district court said,

> First, this case [*Fulle*] involves only one county with two divisions, not an entire State. The proposed plan requires no alteration whatsoever to any existing geographic, political or historic boundaries between them. Second, to the extent they are comparable, the numerical deviation involved here is much greater than that found in those cases. [*Gaffney* and *White*.] Third, there are no other competing legitimate state interests to consider. Fourth, the fashioning of fair and effective relief, could scarcely be easier. In short, none of the complex factors which the Supreme Court found could reasonably be presumed to exist in the case involving the redistricting of an entire state are present here.[43]

Further, while reiterating that the *Gaffney* and *White* decisions held that federal courts are no longer *required* to hear reapportionment suits just because the plaintiffs can point to some numerical deviation, the court stated it was not precluded from scrutinizing *any* plan, regardless of the smallness of its imperfections.[44]

Finally, the court made clear that mere numbers did not define

the court's jurisdiction to enforce a mandamus against the Board if only fourteen of the fifteen Board members had been defendants.

40. 93 S. Ct. 2321 (1973).

41. 93 S. Ct. 2332 (1973).

42. Transition Schedule, § 5(b) of the 1970 Illinois Constitution provides:

"[T]he number of members of the Cook County Board shall be fifteen except that the county board may increase the number if necessary to comply with apportionment requirements." Contrast the court's action in this respect with Sixty-Seventh Minnesota State Senate v. Beems, 405 U.S. 187 (1972) where the Supreme Court held that the district court in fashioning a reapportionment plan could not go beyond the authority of the legislature itself and require a larger number of senatorial districts.

43. Unpublished memorandum opinion by Judge Hubert L. Will, 73 C 2021, at 7-8 (N.D. Ill. Oct. 11, 1973).

44. *Id.*

a *per se* invidious plan nor a "de minimis" (uncorrectable) plan, but that each plan had to be read in light of three overriding considerations —the population imperfections, the necessity for boundary-drawing, and unique and justifying local factors.[45]

FACTOR ANALYSIS

It is these considerations—the degree of numerical imperfection, the type of districts, and the unique local factors—which constitute the balancing test in a judicial review of any reapportionment plan which is neither blatantly discriminatory nor only insignificantly unequal.

I. Population

The early reapportionment cases dealt with population variances of such magnitude that alternative methods of computing population would have been meaningless to the decisions. However, as more recent cases have dealt with increasingly marginal situations, alternative ways of computing population have become important. It has become necessary to examine:

1. Who is included in the population count?
2. How is the disparity from population equality best expressed?

Who is the one person named in the one person, one vote doctrine? Is it a man, a woman, an adult, an inhabitant, a resident, a citizen, a registered voter or an actual voter? The pragmatic response to this question has historically been the "census person"[46] simply because this was the accepted unit of measurement used by the people doing the reapportioning.[47]

Even in the face of alternative or updated sources of counting, courts in reapportionment challenges have frequently declined to entertain any figures other than census figures.[48]

45. *Id.*

46. The accepted unit of population measurement used by reapportionment mapmakers.

47. The basic unit used to district is the census tract which contains persons who are residents of the tract area.

48. A district court has stated:

> We find that the correct basis for the apportionment of the State of Indiana should be upon the United States Decennial Census of 1960 which is judicially noticed even though it may be a fact that the census is outdated and the communities of the state have grown disproportionately to population. The eleven (11) congressmen apportioned by Congress to the State of Indiana is based upon the census conducted by the United States and not upon any other governmental or private census and cannot be changed until the next

However, the Supreme Court has clearly stated that:

> [T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured . . . . Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime . . . . The decision to include or exclude any such group involves choices about the nature of representation . . . [which the courts will leave to the legislature unless directly forbidden by the Constitution.][49]

For example, when census materials have been obviously outdated, courts have relied on projections based on state vital statistics[50] or other alternative headcounts.[51] Evidence of shifting population patterns between the censuses has been considered,[52] and at least twice in the Supreme Court the particular counting patterns of the Bureau of the Census have been held to be inadequate bases for reapportionment districting.[53] The conclusion of the Supreme Court in this area has been that figures other than sometimes misleading census figures may be used as the basis for reapportionment, if they are consistent with an acceptable population-based plan.[54]

One of the most "misleading" and significant problems of the census undertaking has been the undercount of all Americans, particularly urban blacks. No census has ever counted every living person in the United States, and some groups of persons have been even less visible, and hence less countable, than others. The Bureau of the Census has refined its enumerating techniques over the years but still relies on that most elementary statistical device—the headcount. Every person must be counted individually; no sampling or other statistical technique is used.

To satisfy this requirement, the Bureau recruited in 1970, an army

United States Census. We think the census of 1960 must be tolerated until the next official census in order to maintain relative political stability.

Grills v. Branigan, 284 F. Supp. 176, 180 (S.D. Ind. 1968), *aff'd*, 391 U.S. 364 (1968).

49. Burns v. Richardson, 384 U.S. 73, 91-92 (1966).

50. Whitcomb v. Chavis, 403 U.S. 124 (1971).

51. Shalvoy v. Curran, 393 F.2d 55 (2d Cir. 1968).

52. Kilgarlin v. Hill, 386 U.S. 120 (1967).

53. In Burns v. Richardson, 384 U.S. 73 (1966), the inclusion in the census count of aliens allowed the Hawaii state legislature to use voter registration figures instead as the basis for its reapportionment. In Mahan v. Howell, 410 U.S. 315 (1973), the arbitrary assignment of the Census Bureau of Naval personnel to the area where their ships were ported rather than where they actually lived was held to be an inadequate basis for locating them in legislative districts.

54. Burns v. Richardson, 384 U.S. 73, 91 (1966).

of census takers to conduct a door-to-door canvass in target neighborhoods to supplement the use of mail-out, mail-back questionnaires. In addition, the Bureau expanded its efforts to verify all data by cross-checking reports and made more intensive efforts to count transients, traveling salesmen, and similar individuals.[55] However, there are those who simply refuse to be counted: fugitives from justice, men living with women on welfare, families whose size exceeds zoning and housing codes, individuals having contempt for authority or bureaucracy, and those who object to the census for philosophical reasons. The net effect of such resistance is an inevitable undercount.[56]

In April 1973, the Bureau of the Census publically acknowledged an undercount and stated estimates of its impact. "The undercount rates . . . cannot be viewed as final or definitive," the Bureau announced, "but rather as the current best estimates. However, the range of possible error does not appear to be very wide."[57] The likely maximum range was estimated as between 2.3 and 2.8 percent with a probable national average of 2.5 percent. Significantly for apportionment purposes in urban areas, the estimated rate of undercount of white persons was announced as 1.9 percent and of blacks as 7.7 percent.[58] Unfortunately, undercount estimates could not be applied reliably to individual states or regions, let alone counties or cities. The migration data on which the estimates were based were hardly accurate enough to allow such fine calculations.[59]

55. *See* Joseph Waksberg and Magaret A. Giglitto, "The Effect of Special Procedures to Improve Coverage in the 1970 Census," prepared for presentation at the annual meeting of the Population Association of America, April, 1973.

56. A demographic consultant to the City of Chicago testified on the 1970 undercount before the House Subcommittee on Census and Statistics, stating "there is no way of getting a complete census count:

> (1) Because the present state of the art has not yet received a complete solution to the multitude of technical and procedural requirements of a decennial census;
> (2) Because the appropriations framework of the administration and Congress is unlikely to yield to the quantum jump in expenditures a 'perfect census' would require;
> (3) Because of the independence of the American people who don't mind telling census and government to take a jump;
> (4) Because of the encouragement by Congress itself—on the grounds of 'invasion of privacy'—and for people to refuse to participate in the census; and
> (5) Because of avoidance of the census by people not wanting to be found for legal reasons.

HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, SUBCOMM. ON CENSUS AND STATISTICS, REPORT ON ACCURACY ON THE 1970 CENSUS ENUMERATION, H.R. REV. NO. 91-1777, 91st Cong., 2d Sess. 12 (1970).

57. U.S. Department of Commerce News, "Census Bureau Report on 1970."

58. *Id.*

59. "The undercount was calculated as follows: U.S. population is estimated independent of the census, and the census figures are then subtracted from the estimates—the difference is the estimated amount of undercount. The estimated population is de-

Therefore, the defendants in *Fulle v. Dunne*[60] could do no more than assert rough corrections based on the proportionate black and white populations in the city and the suburban districts. In the parties' stipulation of facts, the populations of Chicago and suburban Cook County were increased by 7.7 percent for all reported blacks and other non-whites and by 1.9 percent for all reported whites.

In response to this population adjustment, the plaintiffs amended their complaint from seeking *nine* Chicago and *six* suburban commissioners to seeking *ten* Chicago and *six* suburban commissioners. Although the adjusted population figures varied the totals by only a few percentage points, the new figures could not support the nine and six distribution originally sought. Hence, the undercount argument presented in pre-trial conference by the representatives of the Cook County Board made a significant difference in the plaintiff's strategy.

Continued advances in the technology of undercount estimating may give added impetus to courts' willingness to vary in the future from reported census figures as the sole reapportionment basis.

Even having isolated a population basis, the courts in reviewing reapportionment plans have not developed a systematic approach to measuring the degree of disparity between districts. Generally they have adopted only those methods of measurement presented by the contesting parties. Basically, these methods are:

(a) measuring vote "dilution" of an individual voter against a fully-weighted vote;

(b) measuring the variance between over and under-represented districts; and

(c) measuring the minimum percent of (over-represented) districts necessary to control the legislature.

Computing the minimum percent of population necessary to elect a majority was a key technique to the historical development of reapportionment theory. Beginning with *Baker v. Carr*,[61] the concept of rural or geographic domination of state legislatures was the underlying theme of the one person, one vote doctrine. No better method could exist to support this contention.

The Supreme Court noted in *Reynolds v. Sims*[62] that a legislative reapportionment plan allowing 25.1 percent of the population to elect

veloped by utilizing available figures on births, deaths, medicare enrollment, immigration-emigration, past census data and a complex analysis of age-sex-race distributions." *Id.*

60. Plaintiffs' amended complaint, Fulle v. Dunne, 73 C 2021 (N.D. Ill. 1973).
61. 369 U.S. 186 (1962).
62. 377 U.S. 533 (1964).

a majority to the Alabama state Senate and 25.7 percent to elect a majority to the House was utterly lacking in rationality. The Court accepted this method of calculating numerical disparity because it reflected a most basic proposition of representative government—it described the degree of minority control over the legislative bodies and the undesirable absence of majority rule.

> Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.[63]

However, this method of calculation proved to be less and less conclusive as the challenged numerical disparities became finer.[64]

A more frequently applied method of measuring numerical disparity has involved the concept of population variances between districts. First the Court looked at the *ratio* between the most over-represented and the most under-represented district. In *Reynolds*, for example, the Court explained that population variance ratios of up to 41 to 1 existed in the Senate, and up to about 16 to 1 in the House.[65] This meant

63. *Id.* at 565.

64. For example, if the court had computed the minimum per cent needed to elect a majority to the County Board and relied exclusively on this method, a reapportionment probably would not have resulted. Briefly, the computation would have been as follows: Each Chicago Commissioner represents 351,487 persons and this is the minimum number needed to elect a single Commissioner (each suburban Commissioner represents 434,434 persons). Eight (8) Commissioners form a majority of the Board—eight times 351,487 equal 2,811,896 or 49.44 percent of total Cook County population. Thus, a minimum of 49.44 percent of Cook County population could elect a majority to the County Board. This method of computation hardly describes the degree of numerical disparity measured by other methods.

65. The ratio was calculated as follows:

$$\frac{\text{number of representatives in most over-represented district}}{\text{population in most over-represented district}} : \frac{\text{number of representatives in most under-represented district}}{\text{population in most under-represented district}}$$

OR, in *Reynolds*: Senate calculation:

$$\frac{\text{Lowndes County } 1}{15{,}417} : \frac{\text{Jefferson County } 1}{634{,}864}$$

or 41:1

House calculation:

$$\frac{\text{Bullock County } 2}{13{,}462} : \frac{\text{Mobile County } 3}{314{,}301}$$

or 16:1

that the vote of an Alabama citizen in the most over-represented Senate district was equal to the votes of 41 citizens in the most under-represented district. No interpretation of the equal protection clause could reconcile this degree of numerical disparity.

The ratio method of calculating variance was supplemented by establishing an "ideal" district and measuring the over and under-representation of the extremes.[66] For example, in *Swann v. Adams*[67] the Supreme Court found that a Florida senatorial districting plan allowing a 15.09 percent over-representation and a 10.56 percent under-representation (when compared to an "ideal" district) and a House plan allowing a 18.28 percent over-representation and a 15.27 percent under-representation was constitutionally unallowable.[68] A second supplemental method of computing the variance has been a measure of the *average* over and under-representation when compared to an ideal.[69]

The 1973 cases have uniformly utilized as an expression of imperfection the maximum percent divergence by totalling the extreme over-represented *plus* the extreme under-represented district compared to an ideal district.[70] However, the simplest expression of vote dilution, the very basis of the equal protection analysis, has gone virtually unused since its appearance in *Reynolds*. This is the measurement of the least-weighted vote against the full or undiluted vote. For example, if legis-

66. The ideal district is found by dividing the total area population by the number of representatives.

67. 385 U.S. 440 (1967).

68. Percent over and under the ideal representation was calculated as follows: the "ideal" senate district has a population of approximately 103,160. The most under-represented district had 114,053 persons and the most over-represented had 87,595. Per cent over and under was found by dividing the difference between (a) the most populous district by the number of persons in the ideal district or:

$$\begin{array}{r} 114{,}053 \\ -\ 103{,}160 \\ \hline \end{array}$$

$10{,}893 \div 103{,}160 = 10.56$ percent under-representation

and (b) the least populous district also by the number of persons in the ideal district or:

$$\begin{array}{r} 103{,}160 \\ -\ 87{,}595 \\ \hline \end{array}$$

$15{,}565 \div 103{,}160 = 15.09$ percent over-representation

69. Average percent variation is computed by calculating the percent of over- or under-representation for each district and dividing the absolute sum of those variations by the number of districts.

In Mahan v. Howell, 410 U.S. 315 (1973), the Supreme Court made a very extensive analysis of a plan to reapportion the Virginia General Assembly, which included consideration of the percent of average variance from the ideal of ± 3.89 percent. The plan was held constitutionally allowable.

70. *See* Mahan v. Howell, 410 U.S. 315 (1973); Gaffney v. Cummings, 93 S. Ct. 2321 (1973); White v. Regester, 93 S. Ct. 2332 (1973).

lative district "A" has one-half the population of legislative district "B," the voter in district "A" has a vote as powerful as *two* voters in district "B." Concomitantly, the votes in district "B" have been diluted by one-half.

This simple expression was perhaps the most persuasive statistic presented by the plaintiffs in *Fulle v. Dunne*.[71] An analysis of the meaning of these various methods of expressing the disparity from population equality may in the future lead courts to demand one or another of them, rather than merely accepting the calculations of counsel.

II. Districts

In evaluating redistricting plans, courts must look at districts in three ways:

(1) What type of governmental unit (e.g., federal, state or local) is involved?

(2) How many districts are involved?

(3) Are the districts single-member, multi-member, or a mixture of both?

The federal courts apply stricter standards when dealing with congressional reapportionment than when dealing with state or local redistricting. The difference is based upon the fact that congressional redistricting is governed by article 1, section 2 of the U.S. Constitution, while state and local redistricting is based upon the equal protection clause of the fourteenth amendment. The difference is illustrated by companion cases, one dealing with redistricting of a congressional district and one with state legislative districts in Texas, handed down by the Supreme Court on June 18, 1973. The Court upheld a plan allowing a 9.9 percent maximum variance for state legislative districts[72] while it found constitutionally unallowable a congressional reapportionment variance of 4.7 percent.[73] The law allows even greater flexibility in scrutinizing deviations from perfection in local plans than in reviewing state redistricting.[74]

A second consideration is the number of districts involved in the plan. The Supreme Court in *Reynolds v. Sims* took cognizance of the practical problems involved in reapportioning a large number of dis-

71. Unpublished memorandum opinion by Judge Hubert L. Will, 73 C 2021 (N.D. Ill. Oct. 11, 1973).

72. White v. Regester, 93 S. Ct. 2332 (1973).

73. White v. Weiser, 93 S. Ct. 2348 (1973).

74. *See* Reynolds v. Sims, 377 U.S. 533, 578 (1964).

tricts and allowed a variation.[75] By contrast, *Fulle v. Dunne*[76] rejected the argument of Cook County that the 9.74 percent variation fell within the 9.9 percent spread allowed in *White v. Regester*,[77] pointing to the fact that only two districts were involved, which could more easily be reapportioned.[78]

While complexity is one rationale for the distinction between situations involving few and many districts, another is the sheer numbers of people involved. Where over 11 million people are divided into 59 state legislative districts, a ten percent variation between districts may involve only 18,000 voters, while a ten per cent variation between two districts electing a county board representing a population of 5.6 million may involve 275,000 voters. Thus, a statement of percentage difference may be meaningless standing alone.

Finally, the Supreme Court has, for the most part, treated multi-member districts the same as single-member districts. In *Fortson v. Dorsey*[79] the Court rejected a challenge to a multi-member districting plan, stating that in the absence of deliberate discrimination or a grossly unacceptable population variation, the use of multi-member districts is constitutionally acceptable. In *Whitcomb v. Chavis*[80] the Court reiterated that multi-member districts are not themselves discriminatory either to persons within them or to voters in surrounding single-member districts. The Court then laid down a test for finding multi-member districts discriminatory toward racial minorities: that such districting not only reduces the number of legislative seats to which the minority group is able to elect its members, but that the political process leading to nomination and election is not equally open to participation by members of the group. The Court found this test to have been satisfied in the Dallas county apportionment plan challenged in *White v. Regester*.[81]

The issue of districts will continue to be faced in future reapportionment challenges, particularly as the concept of "representation" rather than the mere numerical "weight" of a vote is expanded. It may be incumbent at some point to determine a congressional, state,

75. Reynolds v. Sims, 377 U.S. 533, 577 (1964).
76. Unpublished memorandum opinion by Judge Hubert L. Will, 73 C 2021 (N.D. Ill. Oct. 11, 1973).
77. 93 S. Ct. 2332 (1973).
78. Unpublished memorandum opinion by Judge Hubert L. Will, 73 C 2021, at 6 (N.D. Ill. Oct. 11, 1973).
79. 379 U.S. 433 (1965).
80. 403 U.S. 124 (1971).
81. 93 S. Ct. 2332 (1973).

or local district's optimum population for representational purposes or to further review the representational advantages of single-member, multi-member, or at-large elections.

III. State and Local Factors

State and local factors are those matters which a legislative body may weigh and consider in the drawing of district boundaries. Presumably, the gerrymandering of one legislator's voting support to effectively deny him re-election in his new district is not a legitimate consideration.

Certainly the construction of districts to exclude completely a racially identifiable group of voters[82] or to minimize the effective strength of that group in each of several districts[83] is not legitimate. Adherence to political or geographic boundaries, or allowances for a partisan power balance may be considered, but only to the extent that they do not supersede the essential population basis of a reapportionment plan.[84]

Fulle v. Dunne introduced a new local consideration, which was the knowledge that the census figures which the County Board was using did not make allowance for a significant undercount of the city's black population. While the district court acknowledged that this was a legitimate factor in the assignment of voting districts, it was not in this case a sufficient factor to justify the amount of vote dilution experienced by suburban voters. The opinion denied the presence of other legitimate local factors and held the 10-5 apportionment of the County Board unconstitutional.

Certainly in the future, new challenges to legislative boundary drawing will raise other assertions of unique local needs. Considerations of such governmental interests as maintaining a city/suburban delineation,[85] or providing for growth of subdivisions, or allowing compensatory districting in impacted minority group areas may all be judicially tested for their validity.

CONCLUSION

Since *Baker v. Carr*, and particularly since *Reynolds v. Sims*, the Supreme Court has been polishing the one person, one vote doctrine

82. Gomillion v. Lightfoot, 364 U.S. 339 (1960).
83. Cousins v. City Council of Chicago, 466 F.2d 830 (7th Cir. 1972).
84. Reynolds v. Sims, 377 U.S. 533 (1964).
85. This governmental interest is also being challenged in the unrelated contexts of school desegregation and exclusionary zoning.

conceived to limit the problem of vote dilution. Between the extremes of unallowable gross disparities and the unfulfillable plea for mathematical exactitude, the Court has fashioned flexible standards for testing reapportionment challenges to plans of substantial imperfection. The issues it has confronted to date have included political as well as racial dilution of votes, the differing needs of federal, state and local forms of government, the problems of counting, and, to some extent, the substantive nature of representation.

Challenges, of course, will be continued by petitioners who wish to change existing governmental structures. It is incumbent upon the judicial system to scrutinize these challenges carefully and deliberately, and it has been toward that end that this analysis of the elements of reapportionment review has been prepared.

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